Office-Supreme Court, U.S.
FILED
JUL 2 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1494

In the Supreme Court of the United States

OCTOBER TERM, 1980

UNITED AIR LINES, INC., PETITIONER

v.

THE DIVISION OF INDUSTRIAL SAFETY OF THE DEPARTMENT OF INDUSTRIAL RELATIONS OF THE STATE OF CALIFORNIA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

LAWRENCE G. WALLACE
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

Baldwin Metals Co. v. *Donovan*, 642 F. 2d 768 4

Farmer v. *Local 25, Carpenters*, 430 U.S. 290 5

Gully v. *First National Bank*, 299 U.S. 109 4

Home Federal Savings & Loan Ass'n v. *Insurance Department of Iowa*, 571 F. 2d 423 5

Marshall v. *Northwest Orient Airlines, Inc.*, 574 F. 2d 119 4

Moore v. *Chesapeake & Ohio Ry.*, 291 U.S. 205 4

Moore v. *Sims*, 442 U.S. 415 4

Public Service Commission of Utah v. *Wycoff Co.*, 344 U.S. 237 4

United Airlines, In re, Docket No. 77-R1D3-658 (Cal. App. Bd. Feb. 4, 1981) 6

United States v. *Lanza*, 260 U.S. 377 5

Worksite Inspection of Quality Products, Inc., In re, 592 F. 2d 611 4

Younger v. *Harris*, 401 U.S. 37 4

Page

Statutes:

Federal Aviation Act of 1958, 49 U.S.C. 1301 *et seq.* 2

Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.* :

Section 4(b)(1), 29 U.S.C. 653(b)(1) 2, 5, 6
Section 18, 29 U.S.C. 667 ..... 5, 6
Section 18(c), 29 U.S.C. 667(c) 1
Section 18(c)(2), 29 U.S.C. 667(c)(2) 6

28 U.S.C. 1331 ..... 3, 4

28 U.S.C. 1337 ..... 3, 4

California Occupational Safety and Health Act of 1973, Cal. Lab. Code (West Cum. Supp. 1981):

§§ 60.5-60.9 1
§§ 6300 *et seq.* 1
§ 6303(a) 2, 3, 4, 6

Miscellaneous:

OSHA Program Directive No. 77-5 (Oct. 30, 1978) 6

13 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure: Jurisdiction* (1975) 4

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1494

UNITED AIR LINES, INC., PETITIONER

v.

THE DIVISION OF INDUSTRIAL SAFETY OF THE DEPARTMENT OF INDUSTRIAL RELATIONS OF THE STATE OF CALIFORNIA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

1. The Division of Occupational Safety and Health, formerly the Division of Industrial Safety (see Br. in Opp. 1), of the Department of Industrial Relations of the State of California ("Cal/ OSHA") conducts an occupational safety and health enforcement program pursuant to the California Occupational Safety and Health Act of 1973, Cal. Lab. Code §§ 60.5-60.9, 6300 *et seq.* (West Cum. Supp. 1981) ("Cal/OSH Act"). Under Section 18(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 667(c), states may operate their own occupational safety and health programs, if approved by the Occupational Safety and Health Administration ("OSHA"). The Cal/OSHA program, which has

been approved by OSHA, applies to all places of employment in California "except a place the health and safety jurisdiction over which is vested by law in, and actively exercised by, any state or federal agency other than [Cal/OSHA]." Cal. Lab. Code § 6303(a) (West Cum. Supp. 1981).[1]

Petitioner, an air carrier, maintains operations and maintenance facilities in San Francisco, California. Cal/OSHA has conducted several inspections at those facilities and has issued citations for violations of the Cal/OSH Act with respect to hazards affecting petitioner's maintenance personnel. Cases involving these citations have been and are being heard by the California Occupational Safety and Health Appeals Board ("Appeals Board"), the independent tribunal with responsibility for adjudicating employer contests of Cal/OSHA citations, and by the California state courts, which review decisions of the Appeals Board.

Petitioner commenced this action on May 7, 1979, in the United States District Court for the Northern District of California. Relying on Cal. Lab. Code § 6303(a), petitioner sought declaratory and injunctive relief against further Cal/OSHA inspections and citations, as well as against further Appeals Board proceedings. Specifically, petitioner claimed that the Federal Aviation Administration has health and safety jurisdiction over petitioner's workplace under the Federal Aviation Act of 1958, 49 U.S.C. 1301 *et seq.*, and that FAA has "actively exercised" that jurisdiction, within the meaning of § 6303(a) of the Cal. Lab. Code,

---

[1] The Occupational Safety and Health Act of 1970 contains an analogous, but somewhat different provision. Section 4(b)(1) of the OSH Act, 29 U.S.C. 653(b)(1), provides that:

> Nothing in this Act shall apply to working conditions of employees with respect to which other Federal agencies * * * exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

by conducting inspections and taking other enforcement actions with respect to petitioner's workplace (Pet. App. 14a-23a). Cal/OSHA moved to dismiss petitioner's complaint on several grounds, including lack of subject matter jurisdiction, failure to exhaust administrative remedies, and abstention.

On July 26, 1979, the district court granted a preliminary injunction against the enforcement of the Cal/OSH Act by Cal/OSHA and the Appeals Board with respect to petitioner's workplace (Pet. App. 43a-47a). Cal/OSHA subsequently moved in the court of appeals to stay the injunction pending appeal; that motion was granted on January 25, 1980. Thereafter, on December 2, 1980, the court of appeals held that petitioner's complaint should be dismissed because the district court lacked subject matter jurisdiction under either 28 U.S.C. 1331 or 28 U.S.C. 1337 (Pet. App. 48a-53a). In support of its decision, the court of appeals noted that petitioner's case was clearly based upon a state statute, Cal. Lab. Code § 6303(a), and held that the essential state law nature of the case was not changed simply because this state statute refers broadly to other state and federal statutes, including the Federal Aviation Act of 1958. This reference was insufficient, in the court's view, to sustain petitioner's contention that its claim was based on federal law. Moreover, petitioner's invocation of federal law, the court held, was in the nature of a defense to threatened or pending state administrative or judicial action and, as such, cannot supply a proper basis for federal jurisdiction.

2. The United States does not believe that this case presents any issue warranting further review. The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals.

The court of appeals correctly held (Pet. App. 51a) that, although this case may involve questions concerning the interpretation of the Federal Aviation Act of 1958, the case

does not arise under that statute within the meaning of 28 U.S.C. 1331 or 28 U.S.C. 1337.[2] As this Court has stated, "[n]ot every question of federal law emerging in a suit is proof that a federal law is the basis of the suit." *Gully* v. *First National Bank*, 299 U.S. 109, 115 (1936). Here, petitioner's action is based on a state statute, Cal. Lab. Code § 6303(a), which provides that Cal/OSHA does not have jurisdiction over a place of employment where health and safety jurisdiction "is vested by law in, and actively exercised by, any state or federal agency other than" Cal/OSHA. Although § 6303(a) makes reference to federal law, such as the Federal Aviation Act of 1958, that alone is insufficient to establish federal question jurisdiction. See *Moore* v. *Chesapeake & Ohio Ry.*, 291 U.S. 205, 213-217 (1934); 13 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure: Jurisdiction* § 3563, at 417-418 (1975). Indeed, FAA regulatory authority is relevant here only as an anticipated defense to efforts by the state agency to enforce state law in the state courts. The federal courts lack jurisdiction in such circumstances. See *Public Service Commission of Utah* v. *Wycoff Co.*, 344 U.S. 237, 248 (1952) ("Federal courts will not seize litigations from state courts merely because one, normally a defendant, goes to

---

[2]Because it found no basis for federal jurisdiction here, the court of appeals did not address the additional grounds for dismissal raised by respondents, the abstention and exhaustion doctrines. See page 3, *supra*; Pet. App. 53a. Although the court of appeals did not rely on the abstention doctrine, that doctrine also supports the judgment below because petitioners established no great or immediate irreparable harm warranting interference with on-going state proceedings. See *Moore* v. *Sims*, 442 U.S. 415 (1979); *Younger* v. *Harris*, 401 U.S. 37 (1971). Likewise, petitioner established no ground for dispensing with the requirement that it exhaust its administrative remedies. See *Baldwin Metals Co.* v. *Donovan*, 642 F. 2d 768 (5th Cir. 1981); *Marshall* v. *Burlington Northern, Inc.*, 595 F. 2d 511 (9th Cir. 1979); *In re Worksite Inspection of Quality Products, Inc.*, 592 F. 2d 611 (1st Cir. 1979); *Marshall* v. *Northwest Orient Airlines, Inc.*, 574 F. 2d 119, 122 (2d Cir. 1978).

federal court to begin his federal-law defense before the state court begins the case under state law"); *Home Federal Savings & Loan Ass'n* v. *Insurance Department of Iowa*, 571 F. 2d 423 (8th Cir. 1978).

Petitioner attempts to avoid these well-established principles by now claiming (Pet. 5, 7-10), for the first time in this litigation,[3] that Cal/OSHA's jurisdiction is derived from the federal OSH Act and is therefore limited by the parallel provision of the federal law (Section 4(b)(1) of the OSH Act, 29 U.S.C. 653(b)(1)) that addresses the question of conflicts between OSHA's authority and the authority of other federal agencies. See note 1, *supra*. Even if petitioner's claim were well-founded, it would provide no rebuttal to the court of appeals' reasoning that this action merely anticipates federal issues that petitioner may raise as a defense to the enforcement of state law in the California courts.

At all events, petitioner misperceives the nature of the federal-state relationship under the federal OSH Act. Under Section 18 of the OSH Act, 29 U.S.C. 667, a state is preempted from regulating with respect to matters covered by federal OSHA standards unless the state has adopted a federally approved plan. States that have adopted federally approved plans are free to conduct regulatory programs relating to occupational safety and health, subject to the maintenance of a federal enforcement presence during the initial phases of such plans. However, Section 18 does not confer federal power on the states; the Section merely removes federal preemption so that the states may exercise their sovereign powers over occupational safety and health. Cf. *Farmer* v. *Local 25, Carpenters*, 430 U.S. 290, 302-303 (1977); *United States* v. *Lanza*, 260 U.S. 377, 381 (1922). Thus, the limitations imposed on OSHA by Section 4(b)(1) of the OSH Act, 29 U.S.C. 653(b)(1), are not imported into

---

[3]Indeed, as respondents point out (Br. in Opp. 7-8, 11-12), petitioner expressly disclaimed reliance on this ground in the court of appeals.

state law, as is evident from the language of the OSH Act. Under Section 18 of the OSH Act, 29 U.S.C. 667, states with approved plans are not prohibited from maintaining coverage that is more extensive or standards that are more stringent than those developed by OSHA.[4] With respect to the promulgation and enforcement of standards, the states are required only to be at least as effective as OSHA. See Section 18(c)(2) of the OSH Act, 29 U.S.C. 667(c)(2). Thus, a state may provide an exemption from coverage narrower than that provided by Section 4(b)(1) of the OSH Act, 29 U.S.C. 653(b)(1), unless such a narrower state exemption would conflict with another federal statute. Indeed, for purposes of compliance with Section 18, a state program need not have any exemption analogous to that provided by Section 4(b)(1) of the OSH Act. See OSHA Program Directive No. 77-5 (Oct. 30, 1978).[5]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

LAWRENCE G. WALLACE
Acting Solicitor General

JULY 1981

---

[4]An exception to this rule exists for standards that apply to products distributed or used in interstate commerce, but it is not claimed that this exception is relevant here.

[5]As the court below pointed out (Pet. App. 51a), the Cal/OSH Act analogue to Section 4(b)(1) may indeed be narrower than Section 4(b)(1) of the OSH Act, 29 U.S.C. 653(b)(1). Cal. Lab. Code § 6303(a) exempts an employer only if another agency "actively exercise[s]" its authority. Thus, an administrative law judge of the California Appeals Board recently rejected a § 6303(a) claim advanced by petitioner in another action, on the ground that, among other things, the FAA had not enforced its requirements. *In re United Airlines*, Docket No. 77-R1D3-658 (Feb. 4, 1981).